IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.02.2007

CORAM:

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN
and
THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN

C.M.A.(NPD) No.1973 of 2002

R.P.Jayakumar — Appellant

versus

R.Jayanthi — Respondent

PRAYER: Civil Miscellaneous Appeal under Section 19 of the Family Courts Act, 1981 against the fair and Decretal order dated 22.7.2002 made in F.C.O.P.No.553 of 2000 on the file of the Principal Judge,Prl.Family Court, Chennai.

For appellant : Mr.Murari

For respondent : Mr.S.Pughazhendhi

JUDGMENT

This appeal is by the petitioner who sought an order of dissolution of the marriage between the appellant and the respondent, and for granting a decree of divorce under Section 13(1)(i-b) of the Hindu Marriage Act, 1955.

2. It is seen that the marriage between the appellant and the respondent was solemnized according to the Hindu rites on 17.1.1994. The parties herein lived together till March 1994. It is stated that even during that period, there was no compatibility between them; that in the meanwhile, the respondent conceived and thereafter moved to her parents' house where she delivered a female child on 18.10.1994. He stated that he had not met the respondent wife thereafterwards for the past six years and the marriage had broken totally. The appellant alleged that the respondent had deserted the appellant and he had offered to take custody of the daughter, to which the respondent refused. Since there was no

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chance of settling the differences between the parties, the appellant had approached the Court for the relief as stated above.

3. The claim was resisted by the respondent stating that the appellant and the respondent lived as husband and wife at the appellant's place till 20.9.1997. She denied that there was incompatibility. She denied the allegation that she walked out of the matrimonial home on her own accord. She pointed out that she was sent to her parents' house for the delivery. The appellant never bothered to visit the respondent to see the new born child. She also alleged that the appellant did not turn up even for the naming ceremony, nor his parents attended the occasion. After much persuasion, the parents of the appellant came and took the respondent and the grand child on 5th March 1995. She alleged that the appellant was cruel that he did not want to forgive the respondent for not listening to his advise to abort the child. In the circumstances, she alleged that the appellant could not offer to have the custody of the child. She also alleged that the appellant never behaved like a normal parent. She also stated that she visited her parents till 1998 every week end and that she had to leave the child with the parents, since she was a working woman and the appellant's mother refused to take care of the child. It is stated that on 15.4.1998, she was forcibly sent out along with the child, since the appellant did not want the child in his home. She submitted that she approached the Tamil Nadu State Legal Services Authority, seeking counselling of the appellant herein. However, to her shock and surprise, she received a summons from the Family Court on the petition filed by the appellant herein. She submitted that she had left all her personal belonging in her matrimonial home. Considering the interest of the child and the larger interest of the matrimonial happiness, she expressed her willingness to settle the differences and live with the appellant.

4. On 22nd July 2002, the Principal Family Court dismissed the petition for divorce on the ground that the appellant had miserably failed to prove the factum of desertion. A perusal of the order shows that the appellant was examined as P.W.1. On the side of the respondent, she was examined as R.W.1 and Dr.Balakrishnan was examined as R.W.2. Referring to the contention of the appellant that the respondent left the matrimonial home on 27.3.1994 and that she had deserted the appellant for the past six years, the Court below pointed out to the examination in chief wherein, P.W.1 deposed that after delivery, the respondent returned back with the child and in January 1998, she went to her parental home. Referring to the cross-examination, the learned Judge pointed out that the respondent had stayed with the appellant since March, 1995. However, he refused to give any reason for not talking to her or not showing his interest in her. Consequently, the Court below held that he had not mentioned the correct date of desertion. The Court below referred to the decision reported (2002) 2 SCC 73 (SAVITRI PANDEY Vs. PREM CHANDRA PANDEY) on the question of desertion that two essential claims must be proved by a person pleading desertion, one is the factum of separation and the other is the intention to bring cohabitation permanently to an end. The Court below found that

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the appellant had stated that he was not interested in his marriage since he had married out of compulsion from his parents and that there was no compatibility. In the cross-examination, the appellant had stated that he had no interest in his wife. Learned Judge also pointed out that the appellant had not shown any material to substantiate his allegation that the respondent had intentionally deserted him and left the matrimonial home. It is also relevant to note that the appellant had stated that he had not seen the child nor does he know the date of birth of the child. Learned Judge also found that the appellant had not taken any step to bring the respondent back to her matrimonial home. Taking note of the evidence of P.W.1, the Court below held that the appellant had not proved that the respondent had deserted the appellant. On the other hand, going by the evidence of the respondent, it held that the respondent had expressed her willingness to live with the appellant. Hence, the Court below found that there was no motive for the respondent to desert the husband. Further, she had taken steps before the Tamil Nadu Legal Services Authority and that an Advocate also visited the appellant's house, wherein, he had sought for time, but had later on proceeded with the petition for divorce. Hence, the conclusion was that the appellant himself had deserted the wife. Referring to the decisions reported in AIR 2002 Madras 156 (K.PALANISAMY Vs. SAMIATHAL) and AIR 2002 SC 88 (ADHYATMA BHATTAR ALWAR Vs. ADHYATMA BHATTAR SRI DEVI), the Court below held that the intention to bring the cohabitation permanently to an end was not proved. The Court below pointed out that it is the appellant who had come forward with a petition for divorce on the ground of desertion and that he alone was to be blamed for the state of affairs. Consequently, the Court below held that he could not take advantage of his own wrong doing. Ultimately, the Court below rejected the plea for divorce.

5. During the pendency of the appeal, the matter was referred to the Tamil Nadu Mediation and Conciliation Centre to bring about a settlement.
However, during the proceedings before the Court, on 15.4.2002, although the wife-respondent had insisted for re-union, the appellant was not willing for a re-union. Considering the position that the parties were not willing to agree for any settlement, the proceedings were closed and returned back to the Court.

6. Heard learned counsel for both sides.

7. A perusal of the order of the Court below shows that the stalemate in the relationship between the parties was brought about only by the conduct of the appellant herein, for which the respondent could not be penalised. As rightly pointed out by the Court below, the appellant herein created a circumstance to forcibly stay away from the respondent. There is absolutely no material to substantiate his plea that the respondent deserted him. Going by the evidence given in the examination in chief and in the cross examination, it is clear that the appellant had not substantiated his allegation. It is clear that it was he who was responsible for driving the respondent and the child out of the matrimonial home. Considering the conduct shown and taking note of the

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incidents that had happened since the respondent went to her parental house for delivery and that she returned back to the matrimonial home after the delivery with the child it is difficult to accept the contention of the appellant herein.We do not find any merit in this appeal to disturb the finding arrived at by the Court below.

In the circumstances, we dismiss the appeal. There will, however, be no order as to costs.

ksv

Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To:

1. The Principal Judge, Prl.Family Court, Chennai.

2. The S.O., VR Section, High Court, Madras.

+1 cc to Mr.R.Saravanakumar, Advocate Sr.No.10785.

+1 cc to M/s. S.Murari & Hameed, Advocate Sr.No.10459.

KLT(CO)
dcp/17.3.07

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